THE
MADRAS LAW JOURNAL.

VOL.] OCTOBER, 1926. [LI.

NEGOTIABLE INSTRUMENTS AND ALTERNATIVE CLAIMS ON THE ORIGINAL CAUSE OF ACTION.

It sometimes happens that a claim based on a negotiable instrument wholly fails, owing to the inadmissibility in evidence of the instrument under Stamp Law. In such cases the party who runs the risk of losing his suit struggles to get a decree by founding his claim on the original loan transaction. It also happens that a party brings an action on a negotiable instrument executed by some one in his individual capacity but the loan was perhaps really advanced not to him individually but either to a firm of which the executant is a partner or to a joint family of which the executant is the manager or other accredited representative. The representative capacity or the firm name does not appear on the face of the instrument, but the suitor concerned desires to get a decree either against all the members of the firm or the entire joint family as the case may be, though the non-executants are not *eo-nomine* liable under the instrument. In such cases also it is usual for a plaintiff to seek his remedy on the original loan transaction.

The validity of a claim based on the original loan transaction in cases like those mentioned above has often come up for consideration before the various High Courts in India. Bombay, Allahabad and Calcutta incline consistently to the view, that there being a substantial claim, the relief based upon the original debt as an independent cause of action ought to be allowed, at any rate, in cases where the negotiable instrument is inadmissible under the Stamp Law. In Madras the preponderance of authority is in favour of the view that where a loan transaction and a document which evidences it are simultaneous, there is only one cause of action for a plaintiff, namely, that based on the instrument. The argument on which this conclusion is sustained is that the

instrument is the only evidence of the transaction and that S. 91 of the Evidence Act is a bar to the giving of any evidence relating to the loan. The leading case in Madras on this point is *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) which has been followed in *Ammalu Ammal* v. *Namagiri Ammal* (2) and *Somaraju* v. *Venkatasubbarayudu* (3). Notwithstanding doubts cast on the correctness of that ruling in *Shanmuganatha Chetti* v. *Srinivasa Aiyar* (4) and *Nataraja Naicker* v. *Ayyasami Pillai* (5), the principle laid down in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) was reaffirmed by Sadasiva Aiyar, J., in *Thankammal* v. *Kunhamma* (6). If, however, a loan transaction preceded the instrument which evidences it,both in point of fact and in point of time, then according to the Madras view when the action on the instrument fails, as for example, owing to the inadmissibility of the instrument in evidence, the claim could be sustained on the original debt and even the plaint could be treated as amended so as to give the required relief to the party. Such was the case in *Nagamma* v. *Venkata Reddi* (7). The Lahore High Court also inclines to the view held by the Madras High Court.

Supposing a suit is brought on a negotiable instrument executed by some one in his individual capacity and it is found as a matter of fact that he borrowed the money either for the purposes of a joint family of which he was the head and manager or on behalf of a firm of which he was a partner and supposing the plaintiff claimed relief either against the entire joint family or against the firm what is the decree to be passed in such a case ? Judicial opinion on this question does not appear to be uniform. The highest Court of Appeal has stated apparently contradictory conclusions, though on a careful study, it may be possible to reconcile its different judgments. It may be mentioned here that there is another class of cases where liability on the instrument is enforced against all members of a joint family on the Hindu Law doctrine of representation [vide *Krishna Aiyar* v. *Krishnaswami Aiyar* (8) and *Thankammal* v. *Kunhamma* (6)].

The broad principle that has been enunciated with regard to negotiable instruments is that no one shall be made liable on

1. (1913) I L R 38 M 660: 26 M L J 19.
2. (1917) 33 M L J 631 at 644.
3. A I R 1925 Mad 351.
4. (1916) I L R 40 M 727: 31 M L J 158.
5. (1916) 32 M L J 354.
6. (1918) 37 M L J 369.
7. (1920) 12 L W 147.
8. (1900) I L R 23 M 597 (F B).

them unless they appear *eo nomine* on the face of the instruments. No one shall enforce a right under a negotiable instrument unless he is on the face of it entitled to do it. So only a benamidar payee could sue for the recovery of money due on a negotiable instrument. [See *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (9)]. On the strength of this principle Ayling and Krishnaswami Aiyar, JJ. refused relief to a plaintiff who in a suit on a pronote executed by one of the partners in his individual capacity sought to make the other partner liable. *Kutti Ammu* v. *Purushotham Doss* (10). In a very nearly similar case reported in *Shanmuganatha Chetti* v. *Srinivasa Aiyar* (4) another Division Bench gave judgment against the entire firm on the principle that when money is borrowed for partnership purposes the firm is liable. It is pointed out in that case that the position of the creditor cannot be made worse by the execution of the instrument by one of the partners alone in his individual capacity. The anomaly that is pointed out is that if there is no instrument the creditor can get a decree against the firm, but if there is an instrument his remedy is restricted to the executant. The highly technical character of the Negotiable Instruments Act is not kept in view in this judgment. The positions taken in *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (4) and *Nataraja Naicker* v. *Ayyasami Pillai* (5) do not go farther than this and similar conclusions have been reached in them on more or less the same line of reasoning. These cases have been decided on the authority of the Privy Council decision in *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11), and in one or two of them, the correctness of the ruling in *Kutti Ammu* v. *Purushotham Doss* (10) which apparently states a different conclusion has been questioned. The other Privy Council case to which attention must be drawn is *Sadasuk Janki Das* v. *Kishan Pershad* (12), where their Lordships lay down in plain terms that nobody can be made liable on a negotiable instrument unless his liability could be made out from the instrument itself. Their Lordships even combat the view that the names of the persons sought to be made liable need in *some way alone* be disclosed.

4. (1916) I L R 40 M 727: 31 M L J 138.
5. (1916) 32 M L J 354.
9. (1906) I L R 30 M 88: 16 M L J 508 (F B).
10. (1910) 9 M L T 120.
11. (1914) I L R 39 B 261: 28 M L J 515 (P C).
12. (1918) I L R 46 C 663: 36 M L J 429 (P C).

In *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11) the suit was by an accommodation acceptor against the drawer by name and his partner to recoup himself for losses sustained by him on behalf of the firm of the drawer. The firm in question carried on business in sugar, shipping it from Mauritius to Hongkong at which latter place a market was to be found for the sugar. The two partners were originally carrying on a rival trade in sugar and with a view to stop the rivalry, they entered into an agreement of partnership which was to be in force for a year and subject to certain conditions. The partners drew bills individually for half the amounts on the plaintiff who as an accommodation acceptor became liable to pay the amounts due on the bills to the Mauritius banks in whose favour they were drawn. The business at Hongkong was looked after by the plaintiff and he had paid himself a portion of the money due to him by the sale of sugar. The business however failed and heavy losses ensued. One of the partners retired the bills he had drawn from the banks by payment. The other partner became insolvent and the banks enforced payments from the plaintiff, who in turn sued the firm for damages he had sustained on their behalf. If plaintiff was not an accommodation acceptor but was a real acceptor who became liable to discharge the bills on account of the dealings between him and the firm, he could not have made this claim against the firm. The firm in such a case would have successfully resisted the plaintiff's claim by saying that he had only paid off a debt due by him and that he could recover nothing against the firm. As plaintiff in this case was only an accommodation acceptor, he was a surety and the firm continued to be primarily liable. So when he discharged the bills he obtained the right to claim re-imbursement against the firm. The Privy Council rightly held this action not to be one brought purely on the bills, but a matter of accounting between the plaintiff and the defendants. They discussed the general law of liability of partners based upon the right of each partner to bind by his acts the firm and concluded that the plaintiff was entitled to indemnify himself against the firm. It is extremely doubtful whether the decree could have been obtained against both the partners if the suit had been brought by the banks in whose favour the bills had been drawn. If the banks had sued on the bills they could certainly have enforced payment from the plaintiff who was the accommodation acceptor and also from the partner who

11. (1914) I L R 39 B 261 ; 28 M L J 615 (P C).

had drawn the bills in his individual capacity. But could they have got a decree against the other partner who had not joined in drawing the bills in question? I venture to suggest that if *Sadasuk Janki Das* v. *Kishan Pershad* (12) lays down sound law, the banks could not have got a decree against the partner who had not joined in drawing the bills. In this view of the case it is submitted that those Madras cases which have been decided on the authority of *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11) have gone on a misreading of the purport of that Privy Council judgment; *Sadasuk Janki Das* v. *Kishan Pershad* (12) really restores the principle laid down in *Kutti Ammu* v. *Purushotham Doss* (10). *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11) does not really state a contrary conclusion and should have been decided like *Sadasuk Janki Das* v. *Kishan Pershad* (12) if the Mauritius banks had been the plaintiffs. *Sadasuk Janki Das* v. *Kishan Pershad* (12) has been followed in a host of cases; it is sufficient to refer to only two such cases, *Nagoor Meera* v. *Hajee Moidin Nainar Meera Ali* (13) and *Hari Mohan Ghose* v. *Sourendra Nath Mitter* (14). The Rangoon case related to a firm and the Calcutta case to a joint family. In both cases the non-executants were exempted from liability. Even the Hindu Law doctrine of representation has been given the go-by and the Privy Council case is given the fullest application.

A very interesting case was the one considered in *Ram Chandra Sahu* v. *Kasem Khan* (15). That also related to a claim on a pronote executed by a partner in his individual capacity. A decree was prayed for against the firm on the footing that the loan was made to the firm and it had had the use of the money. The right to base the claim on the original cause of action was apparently assumed in this case; but the relief was nevertheless refused on the ground that in order to make the firm liable it must be proved that the money was lent under a contract made by the borrower to make use of it for partnership purposes. The subsequent use of the money for partnership purposes by the borrower on his own initiative was held insufficient to make the firm liable.

P. V. AGHORAM AIYAR, B.A., B.L.,

PALGHAT. *Vakil.*

10. (1910) 9 M L T 120. 11. (1914) I L R 39 B 261 : 28 M L J 515 (P C)
12. (1918) I L R 46 C 663: 36 M L J 429 (P C). 13. A I R 1925 R 264.
14. A I R 1925 C 1155. 15. (1925) 28 C W N 824.

THE LATE RAO BAHADUR T. SUBRAMANIA AIYAR

Sir P. S. Sivaswami Aiyar writes :—

" In the death of Rao Bahadur T. Subramania Aiyar of Salem there passed away one of the most conspicuous figures of the mofussil bar of the generation that is fast disappearing. He had a distinguished academical career at the Presidency College and was the contemporary of a set of brilliant young men which included Mr. (now Sir) P. Rajagopalachariar. Gifted with versatile parts, Mr. Subramania Aiyar was a favourite with all his professors and especially Mr. Thompson, the Principal of the College and Dr. Duncan, the Professor of Philosophy. Like several other lawyers who have risen to eminence, he joined the teaching profession before he took to the study of law. As a school master at Kumbakonam, he attracted the notice and won the regard of veteran educationists like Mr. T. Gopal Rao and Mr. Sadhu Seshayya. If the prospects of the teaching profession are a subject of grumbling even now, they were far more limited then and failed to satisfy the ambition of young men of talents. This period of his life was not without its compensation, for it enabled Mr. Subramania Aiyar to improve his gift of lucid exposition. After a period of three years' work in the pecuniarily unattractive field of education, he took to the study of law with all the zest born of a natural aptitude for the subject. On taking his law degree in 1885, he settled down to practise in his native district of Salem without going through an apprenticeship course in Madras. The fact that he was not enrolled as a Vakil of the High Court till five years later did not in any way affect his practice or popularity in the mofussil. The leaders of the Salem bar at the time were Mr. C. Vijayaraghavachariar (fortunately still living) on the criminal side and Mr. V. Krishnaswami Aiyar on the civil side. Mr. Subramania Aiyar had no difficulty in making his way in the profession and soon came to be recognised as a first class all-round advocate and lawyer. His merits were quickly recognised and he succeeded in winning the confidence of his clients and the esteem of all the Judges before whom he appeared. He soon became the leader of the bar and enjoyed a large and lucrative practice. He held the office of Government Pleader and Public Prosecutor for a period of six years towards the end of the nineties.

After making his fortune in Salem, he decided to transfer himself to Madras and practised in the High Court for a

period of ten years. Ill-health compelled him to go back to Salem in 1912 and during the last fourteen years his health was very fickle and began to decline steadily from 1920. In spite of his broken health he largely devoted his latter years in Salem to public work. As a President of the Taluk Board of Salem and as Chairman of the Municipal Council of Salem, he rendered excellent service in these two bodies. As a President of the First Class Bench Court, his services were equally valuable. Even after his health had completely broken down, he worked in the Flood Relief Committee at Salem in 1924 and did not spare himself in organising and carrying out measures for the alleviation of the distress caused by the disastrous floods of that year. He was a man of simple habits and preferred to lead a quiet and unostentatious life and was averse to advertisement of any kind. All deserving public causes appealed to him and he helped them liberally. Appeals to him on behalf of any public institution in need of pecuniary support met with a generous response, no matter whether it was secular or religious, whether it was a reading room or a hospital, or a temple or the relief of the poor.

In social and political matters he was an advocate of cautious reform. He was not a member of the noisy school of extremist politicians and he believed in constructive and useful public work rather than showy agitation.

It would perhaps be more appropriate to this Journal to dwell upon Mr. Subramania Aiyar's characteristics as a lawyer than as a private citizen. Though the greater part of his professional life was spent in a mofussil district, he was one of the few lawyers who have succeeded in keeping up and improving their knowledge of law. He had an excellent knowledge of case-law and was thoroughly grounded in the principles. Apart from his abilities as a lawyer, his outstanding merits were his conscientious thoroughness in the preparation of his cases and his great circumspection. There was no aspect of a case which he failed to study. No relevant detail was beneath his consideration. Every point in a case which could be taken for or against his client was carefully studied by him. He gave every attention to what may be called the strategy of a case and there was no development or eventuality which could take him by surprise. Clear-headed and far-seeing advocates of this type have unfortunately been rare and they are getting still rare to-day. Mr. Subramania Aiyar was one of the ten or twelve advocates of this kind whom I have known within the last forty years.

The disappearance of this type of advocates from the profession must be a matter of the deepest regret.

It might have been expected that with all his gifts and qualifications and experience, Mr. T. Subramania Aiyar would have achieved greater success at the High Court bar than he actually did. Respectable as his practice was, his success in Madras was not equal to his deserts or to his reputation in the mofussil. The transfer of one's practice from one place to another in the middle of a professional man's career is always a risky experiment. Changes of *milieu* and difficulties of adaptation present unforeseen obstacles. The cases in which this experiment has been a success may be counted on one's fingers. This is not the place to dwell on the personal side of the loss caused by Mr. T. Subramania Aiyar's death, but we may mourn the loss of an advocate of outstanding ability, of a lawyer of learning and subtlety and one whose professional conduct was characterised by a high sense of duty to his clients and to the Court, and of an unassuming citizen who was generous to good causes and institutions."

SUMMARY OF ENGLISH CASES.

LAKE *v.* SIMMONS, (1926) 2 K. B. 51: 95 L. J. K. B. 586.

Insurance policy—Construction—Theft by customer—Larceny by trick—Jewel entrusted to customer for approval—Liability of underwriter.

An insurance policy issued to a jeweller contained a clause exempting the insurers from liability for "loss by theft or dishonesty committed by any customer in respect of goods entrusted to him by the assured". A lady customer took two pearl necklaces with intent to steal them, on a false pretension that she was taking them to her husband for approval, and disposed of the same. She was convicted of larceny and thereafter the assured sued the Insurance Company on the policy. *Held,* by a majority of the Court of Appeal (Atkin, L. J. dissenting) reversing the decision of Macardie, J. in (1926) 1 K. B. 366 the underwriters were not liable, as they were protected by the exemption clause. The goods having been entrusted to a customer, in the ordinary sense of the term,

the fact that confidence had been misplaced did not prevent it from being an entrustment.

Per Atkin, L. J. :—The word "entrusted" implies the real consent of the owner who parts with possession and as the customer was guilty of larceny, there could not be in law any entrustment and hence the exemption clause did not protect the insurers from liability.

AKTIESELSKABET REIDAR *v.* ARCOS, LIMITED, (1926) 2 K. B. 83.

Shipping—Charterparty—Full and complete cargo—Meaning of—Failure to load full cargo—Demurrage—Claim for damages—If maintainable.

Under the terms of a charterparty, a ship was to load a full and complete cargo, provision being made for the rate of loading and payment of demurrage in case of delay. The charterers committed default in the matter of loading and hence the ship could carry only a full and complete winter cargo, which was much less than a full and complete summer cargo. The shipowners claimed 'dead freight', *i. e.*, damages based on the difference between the full and complete cargo the charterers had contracted to supply and what they did in fact supply. *Held,* they were entitled to the same. The provision in the charterparty as regards demurrage was only for the detention of the ship and that did not prevent the shipowner from suing for damages for breach of the primary obligation to provide a full and complete cargo.

NICHOLSON *v.* ENGLAND, (1926) 2 K. B. 93 : 95 L. J. K. B. 505.

Landlord and tenant—Lease—Extinguishment of—Operation of law—Subsequent payment of rent—Effect of—Revival of tenancy.

Where a tenancy is extinguished under the law of limitation in force, a subsequent payment of rent will not revive it, whether the tenancy be one at will or from year to year.

LIVERPOOL CORN TRADE ASSOCIATION *v.* MONKS, (1926) 2 K. B. 110 : 95 L. J. K. B. 519.

Income-tax—Association—Dealings among members—If a trade or business—Profits—If assessable to income-tax.

A trade association provided a market for corn trade, newsrooms, exchange and other facilities for its members, who were all required to be shareholders. Entrance fees had to be paid, annual subscriptions and charges for services rendered.

The question arose whether the association carried on a trade, adventure or concern within the meaning of Sch. D, Case I of the Income-tax Act, 1918. *Held,* it did, and the profits were assessable to income-tax. 14 A. C. 381 distinguished.

BUCKLE *v.* HOLMES, (1926) 2 K. B. 125 : 95 L. J. K. B. 547.

Tort—Trespass—Domestic cat attacking pigeons—Liability for damage caused.

The owner of a cat is not liable to damages when it trespasses on the land of a neighbour and does damage by attacking and killing pigeons, which is merely following a natural propensity of its kind.

Classification of animals with respect to liability for tortious acts discussed by Bankes, L. J., and the decision of the Divisional Court in 95 L. J. K. B. 158 affirmed.

SCOTT *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY, (1926) 2 K. B. 204 : 95 L. J. K. B. 510.

Workmen's Compensation Act—Accident proving fatal—Dependents—Whom includes—Widow's illegitimate children by another man—If can claim compensation.

Where a workman was killed in an accident arising out of his employment, and among his dependants was his widow, her illegitimate children by another man could not in any sense be held to be members of his family or dependent on him for the purposes of the Workmen's Compensation Act and the employers were not liable to pay compensation to them also.

In re LANG PROPELLER, LIMITED, (1926) 1 Ch. 585 : 95 L. J. Ch. 287.

Company—Mortgage—Winding up—Interest paid to mortgagee, less tax thereon—Right of the Crown to tax—If a preferential right—Companies Consolidation Act (1908), *S.* 209.

A company effected a mortgage of its properties and subsequently there was a voluntary winding up. Prior to the liquidation proceedings, the company paid to the mortgagee sums by way of interest *minus* the income-tax thereon, but the deduction by way of income-tax was never paid to the Inland Revenue Commissioners. The Crown claimed priority to all other creditors in respect of the income-tax thus payable. *Held,* the deduction was not a tax "assessed" on the company within the meaning of S. 209 of the Companies (Consolidation) Act, 1908, and hence there was no priority in respect of such a debt.

RELY-A-BELL BURGLAR AND FIRE ALARM COMPANY, LTD. *v.* EISLER, (1926) 1 Ch. 609..

Contract—Restraint of trade—Stipulations—Master and servant—Clause not to enter other employment during period of service or get interested in similar business—Breach of—Remedy—Injunction—Damages.

Under a contract of service entered into between the plaintiff and the defendant for a period of five years, the defendant agreed not to enter into any other employment or be interested in the business of any other company dealing in the same goods, *i. e.*, installing or dealing in burglary or fire alarms. During the third year of service, the defendant entered the service of a rival company and was allotted a share therein. The plaintiff claimed reliefs by way of injunction and damages. *Held,* (1) the covenant was quite valid as it related only to the period of service; (2) no injunction could be granted restraining the defendant from continuing in the service of the rival company, or restraining the rival company from employing him, the plaintiff's only remedy being one in damages ; but (3) an injunction restraining the defendant from being interested in the business of any rival company could be granted. Case-law discussed.

FENNELL *v.* EAST HAM CORPORATION, (1926) 1 Ch. 641.

*Statutory body—Education—Teachers—Married women—Dismissal of—Notice terminating services—Validity of—*Bona fides*—Motive—Relevancy of.*

The Educational Authority of a borough in pursuance of certain recommendations of a Committee resolved that the services of married women employed in their schools falling under certain classes should be dispensed with and with that object gave them the requisite notice under their respective contracts of service. The object was to provide work for unmarried women teachers who had been trained at the expense of the Educational Authority, and in the interests of educational efficiency. The policy that was adopted was not one of indiscriminate notices to all married women teachers, but to decide each case after considering the domestic circumstances of each, their duties at home and the earning capacity of their husbands. Three of such teachers who had been given notice sued for a declaration that the notices were invalid and not *bona fide* in the discharge of their duties. *Held,* following the decision of the Court of Appeal in (1926) 1 Ch. 66, the onus was on the plaintiffs to prove that the statutory body acted

in excess of its powers or for an object that was not lawful. The considerations adverted to by the Educational Authority were not irrelevant, and if they acted *bona fide*, their action cannot be challenged in a Court of Law.

GREENBERG *v.* COOPERSTEIN, (1926) 1 Ch. 657.

Company—Twenty members or more—Registration—If necessary—Acquisition of gain—Illegality without registration—Suit for administration of assets—Power of Court to order—Companies (Consolidation) Act, 1908, *S.* 1 (2).

An association consisting of more than twenty members was formed for the purpose of mutual help and raising loans. Weekly sums depending on the number of shares taken were paid into a fund and that was available for distribution among the members in the form of loans carrying interest. Quarrels having arisen among the members, some of them sued the Secretary and the Treasurer for administration of the assets. The latter pleaded that the Association not having been registered was illegal and no relief could be claimed. *Held*, (1) the Association was carrying on a business with the object of the acquisition of gain within the meaning of S. 1 (2) of the Companies (Consolidation) Act, 1908, and not having been registered under the Act, was illegal; but (2) the illegality did not prevent the subscribers from claiming from their agents in whose hands their moneys were the return of such moneys.

In re THAIN: THAIN *v.* THAIN, (1926) 1 Ch. 676: 95 L. J. Ch. 292.

Guardianship—Infant—Custody of—Father's rights—Welfare of infant—Child brought up from infancy by other relations—Effect of.

Under the well-settled practice of the Chancery Courts, the welfare of an infant is not the sole consideration in deciding the person who is to have custody of the infant. It is undoubtedly the paramount consideration, but among other considerations the wishes of an unimpeachable parent stand first. Even where an infant after the death of her mother soon after child-birth has been living for years with some relations who have been bringing her up with care and affection, a claim by the father for custody will prevail, unless the Court is judicially satisfied that the welfare of the child requires that the parental right should be superseded. The question as to who is to have custody is a matter within the discretion of the trial Judge to be exercised judicially and where the correct principles of

law have been applied, the Court of Appeal will not interfere with his discretion.

In re ANNESLEY : DAVIDSON *v.* ANNESLEY, (1926) 1 Ch. 692.

Domicil—Conflict of laws—Domicil of origin English—French domicil of choice—Law to be applied.

The domicil of a person flows from a combination of fact and intention, the fact of residence and the intention of remaining for an unlimited time. The intention required is not an intention specifically directed to a change of domicil, but an intention of residing in a country for an unlimited time. Domicil cannot depend upon mere declaration though the fact of the declaration having been made must be one of the elements to be weighed in arriving at a conclusion on the question of domicil. But if a particular domicil clearly emerges from a consideration of the other relevant facts, a declaration of intention to retain some other domicil will not suffice to destroy the result of these facts.

The question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of English Law as to domicil, irrespective of the question whether the person in question has or has not acquired a domicil in the foreign country in the eyes of the law of that country.

ARCHER-SHEE *v.* BAKER, 95 L. J. K. B. 550.

Income-tax—Stocks and shares in the possession of foreign trustees—Income not remitted to Great Britain—Assessment—Income-tax Act, 1918, *Sch. D, Case V.*

A person residing in the United Kingdom, who is beneficially entitled to the income of a trust fund consisting of foreign stocks and shares in the hands of foreign trustees is assessable to income-tax thereon whether it is remitted to the United Kingdom or not under Sch. D, Case V of the Income-tax Act, 1918. The fact that the assessee is not the owner of the stocks and shares does not matter.

In re BOLD: BANKS *v.* HARTLAND, 95 L. J. Ch. 201.

Will—Construction—Residuary estate—Portion bequeathed to E*—Gift over in case* E *dies without issue to* J*—Death of* J *in the lifetime of* E*—Effect of—Gift to* E *if indefeasibly vested.*

A testatrix by her will devised a portion of her estate to *E* and if he died without leaving issue, that portion was to

be held in trust for *J* if he should attain the age of 21 years or marry under that age. After the death of the testatrix, but during the lifetime of *E, J* died before he attained the age of 21 or was married. The question arose whether *E* thereupon became indefeasibly entitled to the portion bequeathed. *Held*, *E* was not indefeasibly entitled to that portion, and in the event of his dying without leaving issue at his death, the portion would remain undisposed of and pass to the statutory next-of-kin of the testatrix.

In re HEWITT : HEWITT *v.* HEWITT, 95 L. J. Ch. 300.

Will—Construction—Trust to pay income to niece for life "until she takes the veil"—If refers to date of will or of death—Words of futurity.

In 1913 the testator who knew of his niece's intention to take the veil and become a professed nun with its involving a vow to lead a life of poverty made a will directing his trustees to hold a portion of his estate for his niece during her life or until she took the veil. In 1913 the niece took the veil and the testator died some years later. *Held*, the words of futurity in the will as regards the niece referred to her taking the veil at any time after the date of the will and not after the death of the testator and the event upon which her interest was to cease having occurred in the lifetime of the testator, she was not a beneficiary under the will.

HERBERT *v.* HIGGINS, 95 L. J. Ch. 303.

Bankruptcy—Reputed ownership—Grantee under bill of sale taking possession prior to Receiving Order—Service of bankruptcy notice—Act of bankruptcy—Transaction if protected—Bankruptcy Act, 1914, *Ss.* 38 *and* 45.

Notice of the service of a bankruptcy notice, coupled with notice that a creditor intended to take bankruptcy proceedings does not constitute notice of an available act of bankruptcy, as it is not notice of a fact but only of an intention to take proceedings. Hence a creditor who took possession of goods under the terms of a bill of sale before a receiving order had been made against the debtor is protected by S. 45 of the Bankruptcy Act, 1914, though the goods were in the reputed possession of the debtor at the commencement of bankruptcy.

In re CLARK : CLARK *v.* CLARK, 95 L. J. Ch. 325.

Will—Construction—Income of estate to son so long as he can personally enjoy—Adjudication of son—Effect of—Forfeiture.

A testator by his will directed his trustees to hold the income of a portion of his estate for the benefit of his son during " his lifetime, as would not, although the same were payable to him, be by his act or default or by operation of law, so disposed of as to prevent his personal enjoyment thereof " and then followed some alternative provisions in the event of his ceasing to have personal enjoyment. The son became an insolvent. *Held,* there was a forfeiture, and so long as the bankruptcy lasted, the forfeiture would remain operative.

GOLD FIELDS AMERICAN DEVELOPMENT CO. *v.* CONSOLIDATED GOLD FIELDS OF SOUTH AFRICA, LIMITED, 95 L. J. Ch. 329.

Income-tax—Payment of tax in the Dominions—Deduction—Passing on relief—Income-tax Act, 1918.

A company held a number of preferential shares in another company, who themselves held a number of shares in a third company. The third company having paid Dominion income-tax on its dividends, the second company was allowed a deduction with respect thereto when assessed to income-tax in the United Kingdom. *Held,* the relief obtained by them must be passed on to their shareholders, the first company, in their turn.

JAGGER *v.* JAGGER, (1926) P. 93: 95 L. J. P. D. & A. 83.

Divorce—Interim order for maintenance—Settlement of property on second marriage—Divorce Court if can set aside settlement—Parties to application.

A wife obtained a decree *nisi* against her husband and that was duly made absolute. She then applied for permanent maintenance and an interim order was passed providing for maintenance at a certain rate. Before any final order was passed, the husband married again and the moneys owing to him under certain subsisting contracts to work as a sculptor, he assigned to the trustees of a settlement made on his second marriage, leaving a certain sum to satisfy any final order for maintenance that might be passed against him. Subsequently, a final order for maintenance was passed directing him to pay maintenance at a certain rate and to give security for future maintenance. The wife claimed an order setting aside the settlement made on second marriage, as it was practically one made *pendente lite. Held* (by the Court of Appeal affirming the decision of Hill, J.), though the Divorce Court had power on an application being made to it to restrain a husband from

alienating his property and thus defeating claims for maintenance, it had no power to set aside a settlement made on a second marriage, even if it might result in defeating future claims for maintenance.

Per Scrutton, L. J. and *Sargant, L. J.* :—An order affecting such a settlement cannot be made in proceedings to which neither the trustees nor the beneficiaries under the settlement are parties.

W. *v.* W., (1926) P. 111 : 95 L. J. P. D. & A. 56.

Divorce—Custody of child—Wife applying for restitution of conjugal rights—Husband not complying with order of Court—Contempt—Effect of, on custody of child—Welfare of child, the main consideration.

A decree for restitution of conjugal rights was passed in favour of a wife, but the husband did not comply with the order. The wife then applied for custody of their child. *Held,* the mere fact that the husband was in contempt for disobedience of the Court's decree for restitution of conjugal rights did not entitle the wife to the custody. In such a case, the Court has to consider what would be for the welfare of the minor and pass such order as it thinks would be most conducive for its welfare.

In re BOOTH : BOOTH *v.* BOOTH, (1926) P. 118 : 95 L. J. P. D. & A. 64.

Will—Soldier's will—When can be made—Embarkation for service—Accidental burning of will—If amounts to revocation—Duration of will—Period of one year after discharge if applies to English Law as in Roman Law.

A will made by an English soldier just prior to embarkation in pursuance of orders to proceed abroad to take part in a campaign is for all purposes a will made in actual military service. Such a will does not, as under the Roman Law, become null and void a year after the soldier's discharge. Where years after, such a will was destroyed by fire by accident, and the testator kept quiet, there is no revocation of the will and it can be proved by oral evidence.

IN THE ESTATE OF WHITE TODD, (1926) P. 173.

Will—General English will and special will relating to assets in America—Executors different—Interdependant of wills—Proof of wills.

A testator left two wills, one dealing with his English property and another with his American property. The

executors of the two wills were different and there was a specific provision that the latter should be probated in America. *Held,* there was no obligation on the party propounding the first will to obtain probate of the second. In every case the question is if the papers are independent or interdependent.

KHOO HOOI LEONG *v.* KHOO HEAN QUEE, 95 L. J. P. C. 94.

Will—Construction—Settlement of property among sons and their descendants—Grandson through illegitimate son—Subsequent will—Mention of son as legitimate—Rule of construing settlement.

A testator first made a settlement in which after giving himself a life-estate in his realty, he disposed of the property after his death among his sons and their descendants. *X* was a grandson of the testator, but his father was considered to be an illegitimate son and was not mentioned in the settlement. Some months later, the testator made a will disposing of his personalty and therein he referred to the father of *X* as a legitimate son and made a bequest in his favour. The question was whether for the purposes of the settlement also, *X's* father could be treated as one of the sons of the testator. *Held,* there being no ambiguity in the deed of settlement, the subsequent will could not be used as a " dictionary " for construing it. Where there is a gift to a class, such as ' sons, ' there is a *prima facie* interpretation of words denoting descent or relationship which holds the field till it is displaced. Children as such means legitimate children and any evidence *de hors* the instrument itself to show that the settlor must have meant to use ordinary words otherwise than in their usual meaning cannot be admitted.

PALMER *v.* CAREY, 95 L. J. P. C. 146.

Bankruptcy—Agreement to advance money—Purchase of goods—Proceeds of sale to be paid to lender's account—Equitable assignment.

A person who was carrying on business in the sale of goods wanted money for that purpose and he entered into an agreement with another that the latter was to advance moneys for the purchase of goods and as and when the goods were sold the realisations were to be paid to the creditor's account in his bank. The debtor became an insolvent. *Held,* the agreement did not create any right of property in either the goods or the proceeds of sale of the goods amounting to an equitable assignment such as would be binding on the trustee in bankruptcy.

JOTTINGS AND CUTTINGS.

The Motor Peril.—To anyone who values human life and safety and the amenities of existence, which are now gravely imperilled by the default of the responsible authorities in enforcing the criminal law against motorists—and especially against motor cyclists—the debate in the House of Lords on June 30 on Earl Russell's Motor Vehicles Compulsory Insurance Bill is quite the most interesting of recent Parliamentary incidents. The Bill was withdrawn, and it does not matter much now what it contained, but the idea was that every motorist should be compulsorily insured against third party risks to such an extent that an injured person should be guaranteed any damages recovered up to £5,000. For our own part, we have left the criminal motorist alone recently. We have on various occasions expressed our own views with sufficient clearness, and, we hope, with sufficient force, and as the responsibility is not ours, we have watched the growing tale of deaths, and wondered how long the patience of the non-motorist and the law-abiding motorist would endure. Surely never since men professed to be civilised has the indifference to life been so great as it is to-day. Man's "very command over nature," says Mr. G. M. Trevelyan at the conclusion of his recently published History of England, "so admirably and marvellously won, has become his greatest peril."

—*The Law Journal,* July 17, 1926, page 42.

Compulsory Motor Insurance.—But to return to the House of Lords. We admire our own reticence when we read the terms in which the reckless motorist was spoken of. We have never said that fifty miles an hour is the minimum speed of a motor cyclist; indeed, we have admitted that there are law-abiding persons of this class, though they are not often seen. We have never suggested the alternatives of imprisonment with hard labour, or a rope to the nearest lamp-post. We have been satisfied with the former. But expressions like this show that we have been fully justified in the comments we have made on the laxity of the enforcement of the law. It is to that laxity that the deaths which can be read of daily in any paper are due; with a liberal increase for the week-end. But while there was general agreement as to the magnitude of the danger, the methods of Lord Russell's Bill came in for damaging criticism, and it received its quietus when Lord Sumner pointed out that, in the case of the offending motorist's

bankruptcy, the £5,000, or whatever it might be, paid by the insurance company would not go to the injured person, but would be claimed by the trustee in bankruptcy for the benefit of the general creditors. But insurance will be less necessary when all motor racing and pillion riding, and the use of high-speed cars is stopped, and the use of motor cycles is allowed only under strict regulations, their use in towns being prohibited altogether.

—*The Law Journal*, July 17, 1926, page 43.

Appeals "in vacuo".—It was a little startling to hear last week that an application to expedite an appeal, made to the Court of Appeal by two of the most eminent members of the Bar, had been characterised by that Court as discourteous to the Judge of first instance. *Prima facie* it certainly invited criticism. Mr. Justice Astbury had reserved judgment in an important Railway Rates case, and the application in question was thereupon made. Obviously against an undelivered judgment there can be no appeal, but apparently each side had determined, if unsuccessful, to make the Court of Appeal a stepping-stone to the highest tribunal, and they both concurred in the application. *Hinc illae lacrimae*. Happily, the immediate trouble was easily disposed of. The application had been in fact made with Mr. Justice Astbury's knowledge and approval, and so the Master of the Rolls was able to say next day that the question of discourtesy disappeared. He delivered, however, a neat little homily on the importance of each Court in the ascending scale assisting the Court above it with a carefully reasoned judgment. But we rather think the Court of Appeal itself has been known to deal with a case somewhat summarily when it is only *en route* to the House of Lords. The judgment of Astbury, J., prepared with his usual care, was delivered last Tuesday.

—*The Law Journal*, July 24, 1926, p. 63.

Mr. Justice McCardie and Uncaught Criminals.—In a recent charge to the Grand Jury on Assizes, Sir Henry McCardie called attention to the great increase in the number of crimes the perpetrators of which go undetected by the police. His Lordship suggested as a large contributory cause of this (we do not gather that he considered it the only cause) the great change which has come over the duties of the police force in the last fifty years, and more especially since the war. When Sir Robert Peel replaced the old obsolete system of

elected city watchmen and of professional detectives—known as "Bow Street Runners"—by the modern organised and disciplined police force, the duties of a constable were practically confined to the prevention of breaches of the peace and the arrest of felons engaged in serious crimes. Except when directed to execute the warrant of a Justice of the Peace or to serve on some defendant a summons issued at the instance of some private or official prosecutor, it was no part of his duty to assist in conserving the local government of the country. Nor was he expected to interfere with the ill-treatment of children or animals. He was proverbially warned to leave alone the quarrels of husbands or wives, and with several other offences he had nothing to do. Nuisances it was no part of his duty to abate or prevent. Drunks he had no power to arrest unless they committed an assault or were otherwise guilty of breaches of the peace. Motor-cars, and the multitudinous duties they impose on the protectors of the public safety, had not yet come into being out of Tartarus, or wherever else Vulcan may have instigated the designing of these contrivances which the unsophisticated native of Africa and India still calls "devil-machines." Now all this is changed. The legislature has set about controlling the lives of its citizens by enacting innumerable statutes, and the local authorities are equally busy with bye-laws. The relations between the sexes are the subject of rigid interference which grows ever more drastic. Motor-cars, public-houses, and those who resort of them, matrimonial disputes, children, animals, nuisances; all these are now within the view of the policeman. A knowledge of law is expected of him, and he has to attend courses of instruction therein, and even to pass examinations. It is inevitable that he has less time to watch for and shadow the professional criminals who commit burglary or larceny, or to follow like a sleuth-hound on the trail of the murderer.

—*The Law Journal,* July 24, 1926, page 65.

Recovery of Betting Debts.—The recent decision of the Court of Appeal (Bankes, Atkin, and Sargant, L. JJ.) in *Hyde* v. *Tyler* (*Times,* 25th ult.), would seem to indicate that the Courts of Common Law are now engaged in calling a halt to the tendency which commenced a generation ago of trying to find roundabout devices by which the winner of a bet can sue the loser, notwithstanding the statutory bar to the recovery of such debts. At Common Law, as is well known, the King's Bench held that wagers were not indeed irrecoverable

but could only be recovered in actions provided the Court had no other business. Then the Legislature began to interfere. The Gaming Act, 1845, rendered void and irrecoverable all gaming and wagering debts ; and under two earlier statutes, the Gaming Act, 1710, and the Gaming Act, 1825, cheques given in payment of such wagers were deemed to be given for an illegal consideration. There has been other statute law on the point, not relevant to our immediate purpose. But after the last important statute, the Gaming Act of 1892, a reaction in the Courts set in. Ways and means of getting out of the legislative prohibition were devised by ingenious counsel and found unexpected support and sympathy from the Bench. Thus it was held in *De Mottos* v. *Benjamin* (1894, 63 L. J., Q. B 30) that the Act of 1892 does not deprive a principal, employing an agent to make bets for him, of his right to recover from such agent any money in his hands received on account of such bets.

—*The Law Journal*, July 24, 1926, page 65.

The Rule in Hyams v. *Stuart King*.—Again in *O'Sullivan* v. *Thomas* (1895, 64 L. J, Q. B. 398), it was held that a party to a bet could recover from a stake-holder money deposited with a shareholder by him before he had paid it over to the winner. Finally, in *Goodson* v. *Grierson* (1908, 1 K. B. 761), and in *Hyams* v. *Stuart King* (1908, 2 K. B. 696), the Court of Appeal (Moulton, L. J., dissenting), found what practically amounted to a way out of the statutory prohibition altogether. It was there held that if a bookmaker or other winner of a bet threatens to sue the loser, or to have him posted at Tattersall's, or elsewhere, as a defaulter, and then forbears to sue in consideration of the loser promising to pay the debt, or giving a cheque in payment, such forbearance " to sue " is a " new consideration " supporting a new promise to pay, or the implied promise contained in a cheque, which is in no way tainted with the character of a betting transaction, and therefore can be sued upon in the Courts. Since 1908 there has been a harvest of litigation in which the limits of this principle have had to be constantly considered. In *Hyde* v. *Tyler*, where a party to a bet had agreed to abide by the decision of Tattersall's as to the odds, the plaintiff sued on this as on an implied promise to pay. It is difficult to distinguish this case from *Hyams* v. *Stuart King* on any ground of substantial principle. But Mr. Justice Horridge held that

here there was no implied new promise to pay and the Court of Appeal have upheld his decision.

—*The Law Journal*, July 24, 1926, page 66.

The Evidence of Handwriting Experts.—Mr. Justice Swift, in a recent case, refused to pay any attention to the evidence of a handwriting expert on the ground that such evidence was worthless. This view is not at present supported by any authoritative decision, although, ever since the error of M. Guerin (afterwards handsomely acknowledged and retrieved) in the famous Adolf Beck case, many Judges have warned juries not to attach too much importance to it. A practical difficulty is found in ascertaining the qualifications which a witness must possess before he can be accepted as an "expert". There are only one or two persons who actually practise as experts. But Bank clerks, cashiers, shorthand writers, and others who have professional or commercial experience in the deciphering of scripts, are, in fact, generally permitted to be called as expert witnesses at the Old Bailey. Forgery and libel cases, of course, are those in which this crime most frequently arises, but in murder cases the identification of an accused person's handwriting is sometimes material. In the case, two years ago, of the Frenchman, Jacques Vacquier, who was accused of poisoning the landlord of a public-house, and who had purchased poison of a Bloomsbury chemist, the question seemed at one point likely to be material, but the accused in the event admitted the purchase. In the Maybrick case a similar issue was not immaterial. Even if experts were excluded from the Courts in charges involving comparison of handwritings, juries would have to exercise their own opinion by an investigation of the scripts alleged to be identical, and experience shows that they are, in fact, assisted by having their attention drawn to similarities or dissimilarities, which are only discoverable by experts, although, once detected, the jury can discern their presence.

—*The Law Journal*, July 24, 1926, page 66.

BOOK REVIEWS.

THE LAW OF TRANSFER IN BRITISH INDIA, by Sir H.S. Gour. Fifth Edition. Published by Messrs. Butterworth & Co. Price Rs. 45.

The publication of the 5th edition of Sir Hari Singh Gour's Law of Transfer in British India has come none too soon. Since the commentaries on the Transfer of Property Act by the late Sir Horatio Shepherd and Mr. Brown became out of date, Dr. Gour's work has held the foremost place among the commentaries of the Transfer of Property Act. The enactment itself not being a perfect piece of legislation on the subject as pointed out by Mr. Justice Mukherji of the Allahabad High Court in his work on the Law of Transfer, inasmuch as many portions of the enactment are not of much practical importance in this country and because also many questions of daily use have not at all been dealt with in the enactment, the author's discussions though not strictly directed to the terms of the Act are of great advantage in elucidating the subject as a whole. It has also to be regretfully noticed that on many points there are conflicting decisions in the various High Courts and in some cases between decisions in the same High Court. In this state of things in India even the decisions of the Privy Council have not tended to clear up matters and the pronouncements of the highest tribunal are not such as the High Courts can acquiesce in without demur. Here we would only refer to the latest decision of the Privy Council [*Dayal Singh* v. *Indar Singh* (1)] where it has been held that an agreement to sell immoveable property requires registration under S. 55 (6) (*b*) of the Transfer of Property Act if an advance of over a hundred rupees is paid and recited in it. Unfortunately this decision has appeared after the publication of the present work and we have not therefore the benefit of Sir Hari Singh Gour's criticism on it. It is impossible to see how a charge which is created merely by the operation of law or by an implied agreement can be registered. Again, it was only the other day that the legislature had to step in to rectify the situation created by *Shamu Pattar's case* (2) regarding the meaning of attestation as used in the Act, by enacting the Transfer of Property Amendment Act (XXVII of 1926). In this state of authorities Sir Hari Singh Gour's criticism of cases proceeding from his deep study and careful examination are bound to be of great value. Under the various sections of the Transfer of

1. (1926) 24 L W 396 (P C). 2. (1912) I L R 35 M 607: 23 M L J 321 (P C).

Property Act, the learned author has given not only the provisions of the English Conveyancing Act, but also of the recent consolidating enactment in England, the Law of Transfer of Property Act, 1922. It is needless to add that in the present edition the case-law has been brought up-to-date and the text has been revised in appropriate places to suit the growing mass of case-law.

DIGEST OF PRIVY COUNCIL RULINGS (1913 to 1925), with Supplement and Notes to Vols. I and II, by P. Hari Rao. Law Printing House, Madras. Price Rs. 10.

We have great pleasure in welcoming this publication which is intended as a companion volume to the late Mr. Sanjeeva Rao's Digest of Privy Council Rulings which brought the cases up to the end of 1912. The present volumes bring the rulings up-to-date. The plan adopted by the work is so well-known that we need not say much about it. The Digest gives not only the effect of the Privy Council decisions under the various heads but has also noticed how each one of the decisions has been dealt with later by the Privy Council itself and by the various High Courts. This treatment is very useful as it saves the task of going through an index of cases which sometimes turns out to be profitless. We have no doubt this work will enjoy the popularity of Mr. Sanjeeva Rao's work to which it is a necessary complement.

THE LAW RELATING TO PRIVATE COMPANIES IN INDIA, by Alexander Kinney. Second Edition, 1926. Published by Messrs. Thacker and Spink & Co., Calcutta. Price Rs. 8.

This book does not adopt the form of a commentary on the Indian Companies Act of which there are several in the field. This is an attempt to place before the Managing Agents, Secretaries, Directors and others interested in the conduct of affairs of a company or its management a natural and a logical treatment of the law relating to private companies in five chapters with an appendix. This treatment has its own use even to a lawyer making his acquaintance with the Company Law in getting a synthetic bird's eye view of the subject with its bearings. The work is not encrusted with the entire mass of case-law on it; but only the more important decisions have been noticed. We have no doubt that this treatment will be found useful by the beginners in the Law of Companies and by the lay persons having to deal with Companies.